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COURT OF CRIMINAL APPEALS
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NO. PD-0556-20

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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PHI VAN DO
Respondent (Appellant in the Court of Appeals)
v.
THE STATE OF TEXAS
Petitioner (Appellee in the Court of Appeals)

On Review from No. 14-18-00600-CR
in which the Fourteenth District Court of Appeals
considered Cause Number 2130699
from County Criminal Court at Law No. 10
Harris County, Texas
Hon. Dan Spjut, Judge Presiding

RESPONDENT'S AMENDED BRIEF IN RESPONSE TO STATE'S REPLY BRIEF ON DISCRETIONARY REVIEW

ORAL ARGUMENT ORDERED

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Introduction

The State's Reply Brief is full of sound and fury. The State says Mr. Do's theory is "poorly supported" and that this Court should "not be distracted by" it.[1] The State also asserts that Mr. Do's argument is "completely at odds with modern case law."[2] Mr. Do respectfully disagrees.

The State can abandon an element of an offense.

The State says Mr. Do "cites no authority for the proposition that the failure to read an element at the beginning of trial means the State has abandoned the element."[3] Perhaps there is no case saying this in exactly those words. But this does not mean Mr. Do's proposition is incorrect. Nor does it mean there is an absence of authority to support his proposition. Indeed, Mr. Do cited the dissenting opinion in *Niles v. State* in which Judge Yeary wrote:

> In fact, the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. [4]

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[1] State's Reply Brief on Discretionary Review at 8.
[2] *Id.*
[3] *Id.* at 4.
[4] Brief for Respondent at 16 n.27 (quoting from *Niles v. State,* 555 S.W.3d 562, 576 n.8 (Tex. Crim. App. 2018) (Yeary, J., dissenting) (quoting from *Grey v. State,* 298 S.W.3d 644, 650 (Tex. Crim. App. 2009))). The majority opinion does not hold otherwise.

Judge Yeary's declaration was a direct quotation of a statement in Presiding Judge Keller's 2009 majority opinion in *Grey v. State*.[5] It is hardly a remarkable proposition. Nevertheless, the State mocks the idea, claiming it would "elevate the reading of the indictment into some sort of jurisdictional event."[6] The State continues, saying the concept could "negate – or presumably expand – the allegations in an indictment."[7]

Nobody is contending the State can expand the allegations in a charging instrument by reading aloud something extra into a charging instrument's wording. The State's suggestion that Mr. Do's theory would countenance such an act is a wild one. The suggestion seems intended to paint Mr. Do's proposition as a ridiculous idea when it is not.

The State is correct in claiming the State's abandonment of an allegation in a charging instrument can negate certain allegations in that instrument. But this is not an astonishing idea. Consider the following statement by Presiding Judge Keller in *Grey*:

> It is the State, not the defendant, that chooses what offense is to be charged. In fact, the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense. If the State can abandon the charged offense in favor of a lesser-included offense, there is no logical reason why the State could not abandon its unqualified pursuit of the charged offense in favor of a qualified pursuit that includes the prosecution of a lesser-included offense in the alternative.[8]

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[5] *Grey v. State,* 298 S.W.3d 644, 650 (Tex. Crim. App. 2009).
[6] State's Reply Brief on Discretionary Review at 4.
[7] *Id.*
[8] *Grey v. State,* 298 S.W.3d at 650 (emphasis added) (internal footnote omitted).

Class-B-misdemeanor DWI is a lesser-included offense of Class-A-misdemeanor DWI.[9] As *Grey* says, the State may abandon an element of the charged offense and proceed to prosecute a lesser-included offense. Thus, a prosecutor can abandon an element of Class-A-misdemeanor DWI (alcohol content of 0.15 or more) and proceed with a prosecution for Class-B-misdemeanor DWI. This is a decision wholly within the discretion of the prosecutor. Such a decision is not the terrible and shocking phenomenon the State suggests.[10]

In jury trials, no issue is joined until the charging instrument is read to the jury and the defendant enters a plea before that jury.

On page 8 of its reply brief, the State attempts to encapsulate Mr. Do's argument:

> The appellant's argument is that the reading of an indictment, rather than the text of the indictment, determines what charges the defendant faces.[11]

The State asserts that this argument "has little support in the old case law . . . and is completely at odds with modern case law."[12] Respectfully, this is incorrect.

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[9] *See* Tex. Code Crim. Proc. art. 37.09 ("An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;"). Class-B-misdemeanor DWI is established by proof of all the facts required to establish the commission of Class-A-misdemeanor DWI except for one fact. That one fact is that the defendant's blood, breath, or urine showed an alcohol concentration level of 0.15 or more. *See* Tex. Penal Code § 49.04(a), (d).

[10] *See* State's Reply Brief on Discretionary Review at 4 (Mr. Do's proposition "would elevate the reading of the indictment into some sort of jurisdictional event that could negate . . . the allegations in an indictment").

[11] State's Reply Brief on Discretionary Review at 8.

[12] *Id.*

While the State's summarization of Mr. Do's argument is not far off the mark, it is not entirely accurate. A prosecutor's reading of the charging instrument is just one half of the procedure serving to "join issue" in a criminal case before a jury. The other half of the procedure is the defendant's plea. "Without the reading of the indictment and the entering of a plea, no issue is joined on which to try."[13] As announced by this Court in the modern case of *Peltier v. State*:

> The essential point is that until the indictment is read and a plea is entered the issue is not joined between the State and the accused before the jury.[14]

This Court has recognized this to be the law for well over 100 years. Back in 1908, this Court made the following statement in an old case – *Essary v. State*:

> The indictment is the basis for the prosecution. Among other things, its office is to inform the appellant of the charge laid against him, and one of the purposes of the requirement that it shall be read to the jury at the beginning of the prosecution is to inform them in precise terms of the particular charge laid against the defendant on trial. His plea thereto makes the issue.[15]

The State's insinuation that the reading of the charging instrument is unimportant is misguided. The insinuation is wrong in regard to old case law[16] and is

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[13] *Warren v. State,* 693 S.W.2d at 415.
[14] *Peltier v. State*, 626 S.W.2d 30, 31 (Tex. Crim. App. 1981).
[15] *Essary v. State*, 111 S.W. 927, 930 (Tex. Crim. App. 1908).
[16] *See id.; see also Johnson v. State,* 42 S.W.2d 782, 783 (Tex. Crim. App. 1931) ("Until the indictment was read and appellant's plea entered, no issue was joined between the state and appellant."); *Theriot v. State,* 231 S.W. 777, 779 (Tex. Crim. App. 1921) (trial judge erred in refusing new trial when it was shown the indictment was not read to the jury); *Hearne v. State,* 58 S.W. 1009, 1009 (Tex. Crim. App. 1900) ("There was no case before the jury until the indictment was read and the plea of not guilty entered.").

equally incorrect in regard to modern case law.[17] The statutorily-required reading of the indictment in front of the jury is not an empty exercise.[18] Nor is the defendant's entry of a plea some sort of meaningless drill. These two acts serve to "make" (or "join") the issue. The reading of the charging instrument before the jury actually does dictate the charges a defendant faces.

Mr. Do need not have objected to the jury charge.

In regard to the allegation in the information that Mr. Do's blood showed an alcohol concentration level of at least 0.15, the State said:

> The prosecutor did not read the allegation as part of the charging instrument at the beginning of trial, and defense counsel did not object to that omission.[19]

Without specifically saying so, the State posits that Mr. Do should have lodged an objection. The State seems to assume that any time a prosecutor does not read all of the allegations in a charging instrument, an error exists.[20] But as Judge Yeary's

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[17] *See Warren v. State,* 693 S.W.2d at 415; *Peltier v. State,* 626 S.W.2d at 31; *Hinojosa v. State,* 788 S.W.2d 594, 599 (Tex. App –Corpus Christi 1990, pet. ref'd) (it is a mandatory requirement that the prosecutor read the charging instrument to the jury after the jury has been impaneled); *Richardson v. State,* 763 S.W.2d 594, 594 (Tex. App.—Corpus Christi 1988, no pet.) ("It is well-established that until the indictment is read and a plea is entered before the jury, the issue is not joined between the State and the accused."); *Lara v. State,* 740 S.W.2d 823, 828 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd), *cert. denied,* 493 U.S. 827, 110 S.Ct. 92, 107 L.Ed.2d 57 (1989) (purpose of requirement that indictment be read to jury at beginning of prosecution is to inform jury of "precise terms of the particular charge laid against the defendant").

[18] *See* Tex. Code Crim. Proc. art. 36.01(a).

[19] State's Brief on Discretionary Review at 9.

[20] The phrase "seems to assume" is used because the State's brief focuses on the fact that Mr. Do lodged no objection to this supposed error. Apparently, the State believes Mr. Do should have objected to the jury charge because it did not address the 0.15-or-greater allegation.

dissenting opinion in *Niles v. State* teaches us, this is not the case. A review of *Niles* is in order.

The first paragraph of Judge Newell's majority opinion provides an excellent summary of the case:

> Terroristic Threat is usually a Class B misdemeanor, but the offense is a Class A misdemeanor "if the offense is committed against a public servant." Scott Niles, a firefighter, was charged by information with two counts of the Class A version for threatening his fellow firefighters. He was arraigned, tried, convicted, and sentenced on the two Class A counts. But the jury charges had tracked the Class B misdemeanor version of the crime; the jury was not asked if the terroristic threats were against public servants. Niles raised an "illegal sentence' claim on direct appeal. The State conceded that the jury charges only authorized convictions for Class B Terroristic Threat. The court of appeals reformed the judgments to convictions for Class B misdemeanors and remanded for re-sentencing in the Class B range. The question here is whether the court of appeals erred in doing so. We hold that it did. <u>The failure to include a jury instruction on an element of an offense included within the charging instrument amounts to jury charge error subject to a harm analysis</u>. We remand the case to the court of appeals to determine whether Appellant suffered any harm.[21]

There is one key difference between *Niles* and the instant case. Here, the prosecutor did not read one of the two allegations in the information. No such thing happened in *Niles*. Mr. Do takes no issue with the general statement of the law in *Niles* set out in the underlined language above. But that broad statement should not apply in

[21] *Niles v. State,* 555 S.W.3d 562, 564 (Tex. Crim. App. 2018) (emphasis added and internal footnote omitted).

situations in which the prosecutor does not read all of the allegations in the charging instrument. In his dissenting opinion, Judge Yeary explained why this is the case.

Judge Yeary first pointed out that "the jury charges perfectly presented the jury with the Class B misdemeanor offenses."[22] This is the key point. When a jury charge presents a complete offense, the defendant has no reason to object. Judge Yeary explained:

> The State made no objection to the lack of an elevating element in the jury charge. The Appellant cannot reasonably have been expected to level such an objection—for all he knew, the State's failure to object manifested a deliberate abandonment of the greater offense.[23]

Judge Yeary recognized that "the State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense."[24] And he demonstrated that an objection by the defendant would be sort of ridiculous:

> What would Appellant's objection have been at this point? "Your Honor, I object to the prosecutor apparently exercising his unfettered discretion to abandon the greater offense!"[25]

There simply is no jury-charge error when the charge presents the jury with a complete offense. In the current case, the jury charge perfectly presented the jury with the offense of Class-B-misdemeanor DWI. And Mr. Do had every reason to think the

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[22] *Id.* at 574 (Yeary, J., dissenting).
[23] *Id.* at 576 (emphasis added). Judge Yeary seems to suggest that if an objection was appropriate at all, the State should have objected.
[24] *Id.* at 576 n.8 (citing *Grey v. State,* 298 S.W.3d at 650).
[25] *Id.* at 576 n.8.

State had abandoned the greater offense of Class-A-misdemeanor DWI. After all, the prosecutor did not read the elevating element (an alcohol content of 0.15 or more) to the jury. Mr. Do had an even stronger sense that the State had abandoned the greater offense than did the defendant in *Niles*. Judge Yeary essentially said the defendant in *Niles* was justified in assuming the prosecutor had abandoned the greater offense. How much sturdier would Mr. Do's justification for such an assumption be in the current case! The prosecutor did not read the elevating element to the jury. No issue was ever joined in regard to Class-A-misdemeanor DWI. What would the State suggest Mr. Do's objection should have been? "Your Honor, I object. The charge omits an element of a greater offense that was never read to the jury and to which I did not plead!"

The bottom line is that there was no jury-charge error to which Mr. Do should have objected.

A prosecutor may choose to abandon an allegation in a charging instrument by not reading it. Not one of the eleven cases cited by the State in its reply brief contradicts this truth.

The State's heading at the beginning of its reply brief says:

> The failure to read all the elements in the indictment to the jury is trial error subject to a harm analysis, not an abandonment of the unread elements.[26]

[26] State's Reply Brief on Discretionary Review at 4.

This is not a correct statement of the law. And not a single one of the eleven cases the State cites to support the foregoing statement actually does so.[27] Mr. Do will discuss each of the eleven cases in turn.

The State's First Case: *Linton v. State*

The State says "modern case law has treated errors with reading allegations as trial error subject to the harm analysis for non-constitutional error."[28] The State offered the *Linton* case as an example of this modern case law saying that in *Linton:*

> the State failed to read the enhancement paragraphs at the beginning of the punishment phase. If [Mr. Do's] theory was correct that anything not read is abandoned, the First Court should have reversed for a new punishment hearing. Instead, it applied the harm analysis for non-constitutional error and held the error did not warrant reversal.[29]

It should first be noted that Mr. Do is not saying any allegations that are not read to the jury are abandoned. The State has mischaracterized Mr. Do's position. Mr. Do simply says a prosecutor may choose to not read an allegation that serves to elevate an

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[27] The eleven cases cited by the State are, in the order of citation in the State's reply brief, as follows: (1) *Linton v. State,* 15 S.W.3d 615 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); (2) *Kincanon v. State,* No. 07-01-0258-CR, 2002 WL 1461838 (Tex. App.—Amarillo July 3, 2002, pet. ref'd (not designated for publication); (3) *Robinson v. State*, No. 05-01-00702-CR, 2002 WL 115579 (Tex. App.—Dallas Jan. 30, 2002, no pet.) (mem. op., not designated for publication); (4) *Lara v. State,* 740 S.W.2d 823 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd), *cert. denied,* 493 U.S. 827, 110 S.Ct. 92, 107 L.Ed.2d 57 (1989); (5) *Warren v. State,* 693 S.W.2d 414 (Tex. Crim. App. 1985); (6) *Sharp v. Johnson,* 107 F.3d 282 (5th Cir. 1997); (7) *Turner v. State,* 897 S.W.2d 786 (Tex. Crim. App. 1995); (8) *Cain v. State,* 947 S.W.2d 262 (Tex. Crim. App. 1997); (9) *Hernandez v. State,* 190 S.W.3d 856 (Tex. App.—Corpus Christi 2006, no pet.); (10) *Ex parte Preston,* 833 S.W.2d 515 (Tex. Crim. App. 1992); and (11) *Castillo v. State,* 530 S.W.2d 952 (Tex. Crim. Ap. 1976).

[28] State's Reply Brief on Discretionary Review at 4.

[29] *Id.* at 4-5 (citing *Linton,* 15 S.W.3d at 620).

act to a greater crime.[30] In such a situation, the prosecutor's choice is an abandonment of the allegation. But Mr. Do is not saying any act of not reading a charging instrument's allegations to the jury necessarily serves to abandon those allegations. This is an important point because it shows Mr. Do's position is not at odds with *Linton.*

In *Linton,* the enhancement paragraphs in an indictment were apparently not read at the beginning of the trial's punishment phase.[31] And the defendant did not enter a plea to the enhancement paragraphs at the beginning of the punishment phase. This was error because "[w]ithout reading the enhancement allegations and the defendant's plea to them, no issue is joined to enhance punishment . . . ."[32]

The situation in the current case is different. Here, the prosecutor did read the first allegation in the information (which alleged a violation of Class-B-misdemeanor DWI). And here, the defendant (Mr. Do) entered a plea. So issue was joined. The issue joined was the charging of Mr. Do with the offense of Class-B-misdemeanor DWI. There was not a failure to make an issue. *Linton* does not compel a different conclusion.

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[30] For example, as in the instant case, a prosecutor may choose not to read an allegation that a defendant's alcohol content was 0.15 or more. This results in the prosecutor choosing to not charge the defendant with a greater offense and instead charging the defendant with a lesser-included offense.
[31] *Linton v. State,* 15 S.W.3d at 619-20. The word "apparently" is used because the appellate court assumed this to be the case in the absence of any such showing in the record.
[32] *Id.* at 620.

The State's Second Case: *Kincanon v. State*

The defendant in *Kincanon* asserted that the State failed to read the indictment to the jury and that he did not enter a plea.[33] As in *Linton,* the situation in *Kincanon* involved a wholesale failure to read the indictment to the jury.[34] *Kincanon* is therefore different than the case at bar in which the prosecutor did read part of the indictment to the jury.

The State notes that the *Kincanon* Court held that if the above-described failure was an error it was harmless.[35] The State then proclaims:

> Under the appellant's theory, that would have been interpreted as an abandonment of all allegations—*i.e.,* a post-jeopardy dismissal.[36]

But the State again misrepresents Mr. Do's theory. Mr. Do does not contend the total failure to read a charging instrument in front of the jury constitutes an abandonment of the charges. Mr. Do's argument is different. His argument deals with a dissimilar situation. That situation exists when a prosecutor: (1) reads a part of a charging instrument perfectly presenting a lesser-included offense; and (2) declines to read that part of the charging instrument containing an element that would result in the presentation of a greater offense. *Kincanon* simply does not present this kind of a

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[33] *Kincanon v. State,* 2002 WL 1461838 at *1.
[34] *See id.*
[35] State's Reply Brief on Discretionary Review at 5.
[36] *Id.*

situation. The State's claim that Mr. Do's theory runs contrary to the holding in *Kincanon* is wrong. The situations are different.

The State's Third Case: *Robinson v. State*

In *Robinson,* the indictment was not read to the jury.[37] And the defendant did not enter a plea in front of the jury.[38] But the defendant did not object.[39] So the Dallas Court of Appeals said the defendant failed to preserve error.[40] And even if the defendant had preserved error, the Court said any such error was harmless.[41]

The situation involved a complete failure to read the indictment and have the defendant enter a plea. The case at bar is different. Here, the prosecutor did read a portion of the indictment that perfectly presented an offense. And Mr. Do entered a plea to that offense. Issue was joined, so to speak. The trial court did not err in charging the jury concerning the elements of Class-B-misdemeanor DWI. *Robinson* does not hold otherwise.

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[37] *Robinson v. State,* 2002 WL 115579 at *1.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

The State's Fourth Case: *Lara v. State*

Lara is another case in which the prosecutor utterly failed to read the indictment to the jury.[42] And the defendant did not enter a plea before the jury.[43] Thus, *Lara* differs factually from the instant case. Also of significance is the First Court of Appeals' invocation of *Essary v. State* for the following proposition:

> one of the purposes of the requirement that [the charging instrument] shall be read to the jury at the beginning of the prosecution is to inform them in precise terms of the particular charge laid against the defendant on trial.[44]

If a prosecutor entirely neglects to read a charging instrument before the jury, then the above-described purpose has not been accomplished. The jury has not been informed in precise terms of the particular charge laid against the defendant. Contrast this situation with the circumstances in the present case. The prosecutor did read a portion of the information to the jury. That portion of the information set out a particular charge against Mr. Do – Class-B-misdemeanor DWI. The purpose of Article 36.01(a)'s mandate that the prosecutor read the charging instrument before the jury is satisfied. The prosecutor in the current case complied with Article 36.01(a). There was no error in reading only the first paragraph of the information.

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[42] *See Lara v. State,* 740 S.W.2d at 825.
[43] *Id.*
[44] *Id.* at 828 (quoting from *Essary v. State,* 111 S.W. at 930).

The State's Fifth Case: *Warren v. State*

Previously in this brief, Mr. Do set out the following quotation from this Court's opinion in *Warren*:

> Without the reading of the indictment and the entering of a plea, no issue is joined on which to try.[45]

Warren is a good case for Mr. Do. It supports his argument. Nothing the State says about *Warren* changes this fact. The State recognizes that Mr. Do relies on *Warren* and then proceeds to summarize the case as follows:

> There [in *Warren*], the State failed to read the enhancement at the beginning of the punishment phase, and the defendant waited until after the jury was dismissed to complain. *Warren,* 693 S.W.2d at 415. This Court held the post-verdict motion for mistrial adequately preserved the error and reversed without a harm analysis.[46]

The State then went on to explain that a harm analysis is now appropriate.[47] This is all well and good. Mr. Do does not dispute the State's point. But *Warren* involves the total failure of the prosecutor to read the enhancement contained within the charging instrument. *Warren* presents a different scenario than in the current case. Here, the prosecutor did read a portion of the information. And that portion of the indictment perfectly presented the offense of Class-B-misdemeanor DWI. Mr. Do entered a not-guilty plea. Issue was joined. There was no error. The State's discussion

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[45] *See Warren v. State,* 693 S.W.2d at 415.
[46] State's Reply Brief on Discretionary Review at 6 (footnote omitted).
[47] *See id.* at 6.

as to whether a harm analysis should have been conducted assumes the existence of an error in the first place. There was none. The State's discussion of *Warren* entirely misses the point.

The State's Sixth Case: *Sharp v. Johnson*

The State dropped a footnote citing this case. The footnote says:

> The Fifth Circuit has noted the old case law on this subject—which held that if a defendant made a timely objection [to the prosecutor's failure to read the charging instrument to the jury] the remedy was to read the allegations to the jury, but if the defendant waited until after trial to object the remedy was a new trial—made it a reasonable trial strategy for defense counsel to raise untimely objections. *Sharp v. Johnson,* 107 F.3d 282, 290 (5th Cir. 1997).[48]

The footnote explains why defendants may have, at one time, waited to lodge objections to a prosecutor's failure to read a charging instrument's allegations. The explanation assumes the prosecutor wholly failed to read the charging instrument to the jury. This assumption is inconsistent with the facts in the present case. The prosecutor did read a portion of the indictment that perfectly presented the offense of Class-B-misdemeanor DWI. *Sharp v. Johnson* does nothing to weaken Mr. Do's argument that there was no jury-charge error in the first place.

[48] *Id.* at 6 n.1.

The State's Seventh Case: *Turner v. State*

In *Turner,* the enhancement portion of the information was not read to the jury at the beginning of the trial's punishment phase.[49] This Court found that to be an error.[50] This Court went on to say the error was not subject to a harm analysis.[51]

In its reply brief, the State characterizes *Turner* as an "older case."[52] The State says *Turner* no longer accurately states the law regarding whether there should be a harm analysis in such a scenario.

In any event, *Turner* does not address the situation in the current case. In *Turner,* there was a complete failure to read the enhancement allegations contained in the information at the punishment phase. In the present case, the prosecutor read one of the two paragraphs of the information. And that information perfectly presented the offense of Class-B-misdemeanor DWI.

The State's Eighth Case: *Cain v. State*

The State cites *Cain* to support its argument that *Turner* no longer accurately states the law.[53] The State says "*Cain* overruled *Turner sub silentio.*" Whether *Cain* actually did so is merely an academic question in regard to the present case. Here, there was no

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[49] *Turner v. State,* 897 S.W.2d at 787.
[50] *Id.* at 787-88.
[51] *Id.* at 788.
[52] State's Reply Brief on Discretionary Review at 6-7.
[53] *Id.* at 6-7.

jury-charge error in the first place. *Cain* does not directly deal with the reading of a charging instrument. It does not support the State's proposition that a failure to read all the elements in an indictment to the jury is a trial error.

The State's Ninth Case: *Hernandez v. State*

The State cites *Hernandez* as support for its contention that *Cain* overruled *Turner sub silento.*[54] In *Hernandez*, the prosecutor failed to read the enhancement allegations to the jury at the beginning of the trial's punishment phase.[55] The Thirteenth Court of Appeals found this failure to be an error subject to a harm analysis.[56] The case did not involve a prosecutor who read to the jury something less than the entire number of allegations in the charging instrument. So *Hernandez* does not support the State's contention that not reading all the elements in a charging instrument to the jury is error.

The State's Tenth Case: *Ex parte Preston*

As described by the State, Mr. Do's position is "that failure to read an allegation constitutes an abandonment of the allegation."[57] The State says this position is "incongruous with this Court's holding in *Ex parte Preston.*"[58] Mr. Do disagrees. *Preston* does not contradict Mr. Do's argument.

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[54] *Id.* at 7.
[55] *Hernandez v. State,* 190 S.W.3d at 866-67.
[56] *Id.* at 867.
[57] *See id.* Of course, Mr. Do does not contend that any failure to read an allegation constitutes an abandonment.
[58] State's Reply Brief on Discretionary Review at 7.

The State's rendition of the facts in *Preston* is accurate, so Mr. Do repeats the State's summary below:

> Preston was charged with three counts of [aggravated] robbery in a single indictment. At his trial, the State read only one count at the beginning of trial, and the jury was charged only on that count. After conviction on that count, a grand jury reindicted him on the other counts. When the State went for a new trial, Preston filed a pretrial writ alleging a Double Jeopardy violation. This Court held that Preston was entitled to relief. *Preston,* 833 S.W.3d at 518. This Court reasoned that because the State took no affirmative steps to abandon the unread allegations prior to the jury being sworn, Preston had faced jeopardy on all three charges despite two of them not being read.[59]

The underlined language above is critical. For purposes of whether jeopardy attaches to an allegation, the key point in time in jury trials is when the jury is impaneled and sworn.[60] "After jeopardy attaches, any charge which is dismissed, waived, abandoned or on which the jury returns an acquittal may not be retried."[61]

This does not mean a charge may not subsequently be abandoned. It just means that such an abandonment does not negate the attachment of jeopardy. An allegation may still be abandoned by not reading it before the jury. The State's assertion to the contrary is incorrect.

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[59] *Id.* (brackets added) (emphasis added).
[60] *Ex parte Preston,* 833 S.W.2d at 517.
[61] *Id.* (quoting from *Ex parte Scelles,* 511 S.W.2d 300, 301 (Tex. Crim. App. 1974)).

The State's Eleventh Case: *Castillo v. State*

The State cites *Castillo* for the following statement in its reply brief:

> But this Court has long acknowledged the remedy for failure to read allegations from a charging instrument is to have the prosecutor read the charging instrument whenever the problem is brought to the trial court's attention.[62]

It is not at once apparent how this statement is connected to the State's main point in its reply brief. That main point is repeated below:

> The failure to read all the elements in the indictment to the jury is trial error subject to a harm analysis, not an abandonment of the unread elements.[63]

In *Castillo*, the trial court neglected to have the prosecutor read the indictment to the jury.[64] Thus, no issue was joined between the State and the defendant.[65] The *Castillo* opinion then discussed how this problem could be remedied.[66] Of course, in the instant case, issue was joined between the State and Mr. Do. The issue joined was a charge of Class-B-misdemeanor DWI against Mr. Do. It is unclear why the State feels the *Castillo* opinion supports the main point in its reply brief.

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[62] State's Reply Brief on Discretionary Review at 8.
[63] *Id.* at 4.
[64] *Castillo v. State,* 530 S.W.2d at 953.
[65] *See id.* at 954.
[66] *Id.*

Conclusion

The prosecutor did not read to the jury the second allegation in the information. That allegation was that the concentration of alcohol in Mr. Do's breath was 0.15 or greater. But the allegation the prosecutor did read served to perfectly present the offense of Class-B-misdemeanor DWI. And Mr. Do's plea of not guilty to that offense joined the issue.

The State contends that the prosecutor's choice to not read the allegation concerning the alcohol-concentration-level of Mr. Do's breath was an error. And the State further contends that Mr. Do had an obligation to object to this supposed error. But there was no error. By not reading the allegation in question, the prosecutor abandoned the allegation. Mr. Do had no reason to object to a jury charge asking the jury to decide the Class-B-misdemeanor charge. Nothing the State says in its reply brief compels a contrary conclusion.

PRAYER

Mr. Do respectfully prays that this Court affirm the decision of the Fourteenth Court of Appeals. He further requests that this Court make it clear there was no jury-charge error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 20, 2021, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rule of Appellate Procedure 9.5.

Additionally, I certify that on January 20, 2021, I provided this brief to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

/s/ Ted Wood

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 5,253 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a reply brief in an appellate court) is 7,500. Tex. R. App. P. 9.4(i)(2)(C).

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